Issue date: 18Dec2001

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Case Nos.: **2001-INA-00098; 2001-INA-00099**
CO Nos.: **P2000-NY-02456620; P2000-NY-02456621**

In the Matter of:

Glatt Gourmet Corp.
Employer,
on behalf of:

Lev Kimiagarov
Alien;

In the Matter of:

Glatt Gourmet Corp.
Employer,
on behalf of:

Rafik Rabayev
Alien.

Appearance: Earl S. David
For the Employer

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman, and Vittone
Administrative Law Judges

LINDA S. CHAPMAN
Administrative Law Judge

DECISION AND ORDER

These cases arose from applications for labor certification on behalf of Alien Lev Kimiagarov and Rafik Rabayev ("Aliens") filed by Glatt Gourmet Corp. ("Employer") pursuant to § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, New York, New York, denied the applications, and the Employer and the Aliens requested review pursuant to 20 C.F.R. § 656.26.

These are companion cases, essentially identical in all respects. Because there do exist minor differences in their respective Appeal Files ("AF"), we cite herein for clarity only to the page references for no. 00098. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File and any written arguments of the parties.

Statement of the Case

On July 19, 2000, and again on July 24, 2000, the Employer, Glatt Gourmet Corp. through its President, Aba Ibragimov, filed an Application for Alien Employment Certification (AF 9-12), seeking to hire two cooks for the position of "Cook, Specialty, Foreign Foods."[1] The duties for the position were described as:

> Prepare and cook European-Asian cuisine such as Chicken Kiev, Shislick, Dolma, Beef Brissae, Ossobucco and Herring Russian style. Estimate food costs and garnish foods according to menu or customer order.

(AF 12). The ETA 750A identified the nature of the employer's business activity as catering. The total hours of employment were listed as forty hours per week. The daily schedule was from 9:00 a.m. to 5:00 p.m. The wage was $18.89 per hour. No mention was made of overtime or what days were to be worked. *Id*. The applicant was required to have two years of experience as a cook specializing in foreign foods. Evidence of pre-application recruitment was enclosed showing that the Employer, on his

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[1]Under Dictionary of Occupational Titles ("DOT") Occupational Code No. 313.361-030, the defined duties of a **COOK, SPECIALTY, FOREIGN FOOD(hotel & rest.)** include plan[ning] menus and cook[ing] foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel 7 rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.). *GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77*.

own, advertised the position from May 19, 2000 to May 21, 2000 in *Newsday*, a newspaper published in the Town of Huntington, County of Suffolk, County of Nassau, New York City. (AF 2-4). Additionally, Employer posted a "Notice of Job Offer" (AF 1) but no response was received from these efforts. (AF 8). With the submission of the application and supporting documentation Employer requested a reduction in recruitment.[2] *Id*.

On September, 2000, the New York Department of Labor informed Employer that in order to continue processing the labor certification applications for the Aliens, the Employer was required to, among other things, submit an original menu from the business and proof that the business had enough work to guarantee continuous year round employment. The Employer was also asked to submit an affidavit of publication in order to continue processing the request for reduction in recruitment. (AF12). By letter dated October 19, 2000, Employer informed the New York Department of Labor that the business employs thirteen employees and has sufficient income to hire additional cook(s), as it has a gross income of $1.25 million (AF 20).

On November 20, 2000, after reviewing the applications, the CO issued a Notice of Findings ("NOF") in the two cases in which she advised the Employer of her intent to deny both applications. As grounds for denying labor certification, the CO cited 20 C.F.R. § 656.20 (c)(8), stating that the job opportunity must be clearly open to U.S. workers; 20 C.F.R. § 656.21 (b)(2), stating that the employer must document that the requirements for the job opportunity are those normally required for the performance of the job in the United States and if they are not normally required, they arise from business necessity; and 20 C.F.R. § 656.3 stating that "Employment" means permanent full-time work by an employee for an employer other than oneself. (AF 22-24).

The CO noted that the nature of Employer's business activity is "Catering" and the job offered is for a Cook, Foreign Specialty, whose duties are to prepare and cook European Asian cuisine. The CO referenced the Employer's two applications for the same position. The CO also noted that the two positions are for full-time work, forty hours per week from 9:00 a.m. till 5:00 p.m. The CO questioned the need to employ cooks on a full-time, forty hour a week basis from 9:00 a.m. till 5:00 p.m., given

[2]A request for reduction in recruitment (RIR) is made when an employer, prior to applying for labor certification with the state or local employment service, takes it upon himself to advertise the position to the public. If there is no response to the employer's advertisement, the employer may request a waiver of the application requirement and have the application forwarded to the CO. RIR requests are encouraged on applications for occupations for which there is little or no availability; which have no restrictive requirements; which meet the prevailing wage; and for which the employer can show adequate recruitment through sources normal to the occupation and industry within the previous six months. Requests for RIR processing are given expedited processing.

that businesses involved in catering do not employ workers for this period of time.[3] The CO indicated that while it appears that Employer has sufficient income to pay the cook(s), the issues are whether the Employer can guarantee permanent full-time (year round) work and whether the Employer has a business need for the job requirements. The CO concluded that the Employer's job offer failed to comply with the Federal Regulations.

The CO informed Employer that in order to rebut this finding, it should submit evidence which clearly and fully established that the requirement for two additional Cooks, Foreign Specialty arose from business necessity and that a full-time forty hours per week, 9:00 a.m to 5:00 p.m. work week year round could be guaranteed for the positions. (AF 23). To prove business necessity, the Employer was required to demonstrate: 1) that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer; and 2) that the job as currently described existed before the employer filed the application for alien labor certification. *Id.*

On December 20, 2000, the Employer filed a rebuttal (AF 44) that included the following:

1. A copy of the company's payroll record (wage and tax register) for the third quarter of 2000 (quarter ending September 30, 2000) showing gross earnings for the third quarter along with all withholdings. (AF 40-43).

2. Invoices for several food purchases and linen services during the third and fourth quarter (from September through November, 2000). (AF 31-39; AF 55-63; AF 66-71).

3. Sample contract entered into on December 5, 1999 for an event on February 1, 2001 (AF 91) and sample contract entered into on December 26, 1999 for an event on October 29, 2000. (AF 92).

4. A company menu. (AF 74-76).

5. Photographs of various events which the Employer catered. (AF 48-54).

6 Various business related expenses and bills. (AF 72-73; AF 77-80).

After reviewing the above documents, the CO issued a Final Determination ("FD") on January 17, 2001, denying certification pursuant to sections 656.21(b)(2) and 656.3. The CO found that the evidence submitted does not adequately establish a business necessity for a Cook, Foreign Specialty

[3] The CO makes this conclusion without referencing what the job of catering entails or what the requirements are for a catering job.

and the evidence also failed to establish that the Employer could guarantee permanent full-time work for the position of Cook, Foreign Specialty. The CO reasoned that the evidence did not support a finding that business demands necessitate the hiring of additional cooks on a permanent full-time basis because: 1) the nature of the business is catering, and as the CO indicated in the NOF, catering establishments do not normally consistently employ cooks on a full-time basis the same as restaurant establishments might and 2) the evidence does not establish the Employer's ability to guarantee a consistent forty hour per week, 9:00 a.m. to 5:00 p.m. work week for the position offered.

Discussion

The CO's denial of certification in this case was based on 1) Employer's failure to adequately establish "business necessity" for a Cook, Foreign Specialty as required in section 656.21(b)(2)(i) of the regulations, which establishes that if the requirements for the job opportunity are not those normally required for the job opportunity, then the employer must show a business necessity and 2) the definition of "Employment" in section 656.3 of the regulations, which defines the term as "permanent full-time work by an employee for an employer."

With respect to business necessity, the purpose of section 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture Int'l Assoc., Ltd.*, 1987-INA-569 (Jan. 13, 1989) (*en banc*); *Rajwinder Kaur Mann*,1995-INA-328 (Feb. 6, 1997). The Board has held that once a CO challenges a job requirement under section 656.21(b)(2) as not being normally required for the job or within the DOT, the employer bears the burden of establishing business necessity. *Escalen Institute Soviet American Exchange Program*, 1992-INA-401 (Dec. 28, 1994)(*en banc*). Employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of Employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the Employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). The first prong establishes a link between the job requirement and the employer's business. The second prong ensures that the requirement is related to the job duties which the employee must perform.

With respect to "Employment," the Board has held that an employer bears the burden of establishing that a position is permanent and full-time. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*). If the Employer's own evidence does not show that the position is permanent and full-time, certification may be denied. *Rajwinder Kaur Mann, supra*.

In the instant case, the CO is challenging the offered job itself as opposed to challenging the business necessity of a job requirement. Thus, the CO questioned the need to employ cooks on a full-time, forty hour a week basis from 9:00 a.m. till 5:00 p.m., given that businesses involved in catering do not employ workers for this period of time. The Board has long held that an employer does not have to prove the necessity for the job itself, *Lebanese Arak Corp.*, 1987-INA-643 (Apr. 24, 1989) (*en banc*); rather, the employer's burden is to establish that a *bona fide* job opportunity exists. *Amger*

Corp., 1987-INA-545 (Oct. 15, 1987) (*en banc*); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*).

The CO in this case characterized the issues as whether the Employer can guarantee permanent full-time (year round) work, and whether the Employer has a business need for the job, or more precisely, whether the job offered has been mischaracterized by the Employer. By focusing on the nature of the Employer's business activity and denying certification because that activity does not necessitate the hiring of a cook under the requirements specified, the CO, in essence, has changed the job title to that of "Caterer" or "Catering Cook." While the DOT does not list a position for "Caterer," or "Catering Cook" there are listings for positions which involve catering, including "Caterer Helper" (DOT No. 319.677-010) and "Manager, Food Service" (DOT No. 187.167-106). As the name suggests, a caterer helper assists the caterer in preparing and serving food and refreshments at social affairs.[4] A food service manager, among other things, coordinates food service activities of hotel, restaurant, or other similar establishment or at social functions.[5]

The Board has faced similar situations in which a CO has challenged a job title and reclassified the same. *See, e.g., Chams, Inc., d/b/a Dunkin' Donuts*, 1997-INA-40 (Feb. 15, 2000) (*en banc*). In *Chams*, a series of cases consolidated before the Board, the Board addressed the process for a CO's challenge to a job title and an employer's burden in rebutting any reclassification of the job offered. *Id.* at 232 and 541. It is well established that the DOT is a flexible document, and that it should not be applied mechanically. *Lev Timashpolsky*, 1995-INA-33 (Oct. 3, 1996); *Promex*, 1989-INA-331 (Sept. 12, 1990). Using the DOT as an "occupational guideline" is necessary, as the DOT is unable to list every job opportunity within the United States. Thus, the DOT must be utilized in

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[4]Pursuant to the DOT No. 319.677-010, a **Caterer Helper (personal ser.)** prepares and serves food and refreshments at social affairs, under supervision of caterer (personal ser.): Arranges tables and decorations. Prepares hors d'oeuvres, fancy and plain sandwiches, and salads. Serves food and beverages to guests. Washes and packs dishes and utensils for removal to catering establishment. *GOE: 09.05.02 STRENGTH: L GED: R3 M2 L2 SVP: 3 DLU: 77.*

[5]Pursuant to the DOT No. 187.167-106, a **Manager, Food Service (hotel & rest.; personal ser.)** coordinates food service activities of hotel, restaurant, or other similar establishment or at social functions: Estimates food and beverage costs and requisitions or purchases supplies. Confers with food preparation and other personnel to plan menus and related activities, such as dining room, bar , and banquet operations. Directs hiring and assignment of personnel. Investigates and resolves food quality and service complaints. May review financial transactions and monitor budget to ensure efficient operation, and to ensure expenditures stay within budget limitations. May be designated according to type of establishment or specialty as Caterer (personal ser.); manager, Banquet (hotel & rest.); Manager, Cafeteria or Lunchroom (hotel & rest.); Manager, Catering (hotel & rest.); Manager, Food and Beverage (hotel & rest.); Manager, Restaurant or Coffee Shop (hotel & rest.). *GOE: 11.11.04 STRENGTH: L GED: R4 M4 L4 SVP: 7 DLU: 80.*

a fashion that supports the intent of the law, and provides a flexible framework which must then be analyzed "in the context of the nature of the nature of Employer's business and the duties of the job itself." *Trelictron Indus*., 1990-INA-188 (Dec. 19, 1991). As a result, it has been held that the CO may challenge, *inter alia*, the employer's classification of a particular position. *Downey Orthopedic Medical Group*, 1987-INA-674 (Mar. 15, 1988) (*en banc*). Employer is then required to provide sufficient evidence to rebut the reclassification. *Theresa Vasquez*, 1997-INA-531 (July 9, 1998).

With reference to whether these cases involve an unduly restrictive job requirement, we note that, here, the CO informed Employer that in order to rebut the findings in the NOF, it must submit evidence which clearly and fully establishes that the requirement for two additional Cooks, Foreign Specialty arises from business necessity and that a full-time forty hours per week, 9:00 a.m to 5:00 p.m. work week year round can be guaranteed for the positions. In rebuttal, the Employer stated that of his fifteen current employees, five are cooks; the need for additional cooks arises from the fact that his catering establishment is booked to capacity, and the business caters nearly 500 parties a year. (AF 49).[6] The CO denied certification stating that the evidence submitted by the Employer failed to establish business necessity and a permanent full-time need for the additional cooks. The CO misapplied the business necessity standard as set forth in 20 C.F.R. § 656.21(b)(2)(1)(A). The regulation does not allow for the CO to challenge the Employer's need for the job. Rather, business necessity only needs to be proven if the employer insists on additional requirements that are not normally required of the job. To learn what the requirements are for a particular job, the CO need only refer to the DOT. With the DOT as a guide, the CO is bound by the job descriptions listed and the job description given by the Employer in the Application for Alien Labor Certification.

With these principles in mind, these cases should be remanded to the CO for the issuance of new NOFs, which accurately spells out the issue, that is, whether it is one of reclassification or whether it is one of business necessity for an unduly restrictive job requirement. The CO's failure to adequately articulate the issue(s) involved in the case has created a due process problem, because if this is a case involving business necessity, the Employer has not been given the opportunity to rebut the NOF finding that catering establishments do not normally employ workers on a full-time basis, forty hours per week, 9:00a.m. to 5:00 p.m. If this is a reclassification case, the Employer has not been given the opportunity to rebut the reclassification.

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Certifying Officer for further action as set forth above.

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[6] In his letter requesting review of the denial of labor certification, the Employer indicated that it caters over 250 events a year. (AF 103).

For the panel:

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LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petition for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.